Petition

81-1368

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CLARENCE MCNEELY,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court erroneously overruled the defendant's motion to dismiss the indictment for the reason that the indictment merely alleged a violation of a state statute, namely, Art. 5.05, et seq, Texas Election Code, and was not sufficient to allege a violation of 18 U.S.C. §1341, the mail fraud statute.

2. Whether the trial court erroneously admitted incriminating hearsay statements of a co-defendant contrary to Fed. R. Evid. 801 (d) (2) (E) and other hearsay testimony when no independent evidence showed that a conspiracy existed to show that the petitioner herein was a member of a conspiracy.

3. Whether the trial court erroneously admitted the absentee election paraphernalia which had been illegally seized contrary to state law.

4. Whether the Texas Statute requiring the use of the mails for mailing absentee ballots and the time limits prescribed therefor is unconstitutional and a violation of 42 U.S.C. §1973, the Voting Rights Act of 1965.

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2. Whether a person can be convicted pursuant to 18 U.S.C. §1341 when the integral part of the conviction is based on the violation of a state statute which is unconstitutional.

3. Whether a person can be convicted pursuant to 18 U.S.C. §1341 when evidence is admitted at trial which has already been ruled by the state court to be illegally seized and hence not admissible in a state forum.

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No. _____

IN THE
UNITED STATES SUPREME COURT

October Term, 1981

CLARENCE McNEELY,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered October 5, 1981, as modified by an opinion entered November 3, 1981, on Appellant's Motion for Rehearing.

CITATIONS TO OPINIONS BELOW

The original opinion of the Court of Appeals and the opinion on rehearing are unreported. Both opinions, together with the judgment of the Court below are attached hereto as Exhibit "A".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). Petitioner having been convicted of a criminal

offense against the laws of the United States.

QUESTIONS PRESENTED

1. Whether the trial court erroneously overruled the defendant's motion to dismiss the indictment for the reason that the indictment merely alleged a violation of a state statute, namely, Art. 5.05, et seq, Texas Election Code, and was not sufficient to allege a violation of 18 U.S.C. §1341, the mail fraud statute.

2. Whether the trial court erroneously admitted incriminating hearsay statements of a co-defendant contrary to Fed. R. Evid. 801 (d) (2) (E) and other hearsay testimony when no independent evidence showed that a conspiracy existed to show that the petitioner herein was a member of a conspiracy.

3. Whether the trial court erroneously admitted the absentee election paraphernalia which had been illegally seized contrary to state law.

4. Whether the Texas Statute requiring the use of the mails for mailing absentee ballots and the time limits prescribed therefor is unconstitutional and a violation of 42 U.S.C. §1973, the Voting Rights Act of 1965.

STATUTORY PROVISIONS INVOLVED

1. The following Federal Criminal Statute is involved: *18 U.S.C. §1341*: (Frauds and Swindles)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give

away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimidated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereof, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than 5 years, or both.

2. The following Texas State Statutes are involved:

Art. 5.05, V. A. T. S. of the Texas Election Code provides procedures for absentee voting by mail. The full text of Art. 5.05 may be found in the appendix.

STATEMENT OF THE CASE

Clarence McNeely, the Petitioner, and Norman Corley, were charged by indictment in the Eastern District of Texas with a violation of 18 U.S.C. §1341, commonly known as the Mail Fraud Statute.

After a plea of not guilty, the Petitioner and Mr. Corley were tried by jury in the District Court for the Eastern District of Texas, sitting at Beaumont, Texas. He was found guilty and subsequently sentenced to two years in prison. The co-defendant, Corley, was found not guilty.

Mr. McNeely appealed and the Court of Appeals for the Fifth Circuit affirmed the conviction in an opinion dated October 5, 1981. In response to Petitioner's timely Motion for Rehearing, the original panel entered an amended opinion

dated November 3, 1981, which denied the rehearing motion but which held that the Petitioner's culpability was premised on his involvement with hand-delivering the ballots, and not on the subsequent forging of the ballots. The forgery was committed by others and the Petitioner played no part in it whatsoever.

STATEMENT OF THE FACTS

The Petitioner, Clarence McNeely, had served as the county clerk of Hardin County, Texas, for approximately 28 years. The co-defendant, Norman Corley, was not a public official. In the Democratic Primary Elections in 1978, McNeely was forced into a run-off, which was scheduled for June 3, 1978. Prior to the run-off election, he attended a meeting in Silsbee, Texas, where Houston Thompson, Norman Corley, Dorothy Monson and others were present to discuss strategy for promoting absentee voting in the run-off election. It was decided that an effort should be made to have as many people as possible to vote in the run-off election by the absentee voting mail process. The applicable statute dealing with voting by absentee mail is Art. 5.05, et seq. Texas Election Code, which is included in the appendix.

Following the meeting, Dorothy Monson and some of her friends obtained applications for voting by absentee mail for approximately 109 citizens of Silsbee, Hardin County, Texas, and these applications were filled out and mailed to the County Clerk, the Petitioner herein, as provided by law.

Because of the unpredictability and unreliability of the use of the mails, together with the coming Memorial Day holiday the Petitioner, instead of mailing the ballots to the voters in accordance with the Texas Election Code delivered the ballots en masse to the co-defendant, Norman Corley, who in turn delivered them to Dorothy Monson.

Mr. Monson told Corley that she did not think she would

have enough time to deliver the ballots to all 109 voters for whom absentee ballots had been prepared and she testified that Corley told her to mark them hereself. Monson further testified that she spoke with Houston Thompson who advised her to mark the ballots and sign the names in various different ways so as to conceal the fact that they had not been voted by the persons to whom they were addressed. The record is abundantly clear that the Petitioner, Clarence McNeely, delivered the ballots to Corley, but he, the Petitioner, was not involved in the actual forging of any names on the ballots nor did he know of any such scheme.

Monson testified that she then returned the ballots to Norman Corley in the transmittal envelopes which were addressed and properly stamped, to the County Clerk. She testified that she did not mail them and Norman Corley testified that he neither received these ballots from Monson nor did he mail them. How the ballots were placed in the mails or by whom was never established.

The forged ballots arrived at the County Clerk's office by mail prior to June 3, 1978, the run-off election date. The members of the absentee ballots canvassing board convened in the courthouse of Hardin County in Kountze, Texas, on said date to count the ballots. The ballots had been counted and while the judges were sitting around talking they began to look at the carrier envelopes and became suspicious about the handwriting similarity of a number of the marks and signatures.

Rather than turing the 109 suspicious ballots over to the Petitioner, the County Clerk, as required by state law, the vote tallier turned them over to a Mr. Ratliff, the Democratic County Chairman. A further investigation revealed that the ballots had been forged and that they had not been cast by the voters who were supposed to have received them.

HOW THE QUESTIONS WERE DECIDED AND RULED ON

Petitioner contended in his brief on appeal that he should have been acquitted because of the following reasons:

1. At most, the Petitioner was guilty of having violated the Texas Election Code in not mailing the ballots as required by law, a misdemeanor, but since he did not participate in the actual forging nor did he have any knowledge that the ballots would be forged, he could not be found guilty of 18 U.S.C. §1341 as a matter of law, and his motion for an instructed verdict should have been granted.

2. The incriminating hearsay statements of the co-defendant and co-conspirators should not have been admitted since the record was totally void of the Petitioner's participation in any fraudulent scheme.

3. The absentee election paraphernalia, which had been illegally seized contrary to state law, should not have been admitted into evidence.

4. The Texas Statute requiring the use of the mails for mailing absentee ballots and the time limits prescribed therefor is unconstitutional and hence basing the conviction on an unconstitutional state statute, is void.

In affirming the conviction, the Fifth Circuit mistakenly noted in its original opinion dated October 5, 1981, that the Petitioner had told Dorothy Monson to fix the ballots. The other contentions previously noted were overruled. In a subsequent opinion delivered pursuant to Petitioner's Motion for Rehearing, the Court stated that the Petitioner's culpability was premised on his involvement with hand-delivering the ballots, and not on the forgery.

REASONS FOR GRANTING THE WRIT

1. Whether a person can be convicted pursuant to 18 U.S.C. §1341 when the only evidence adduced at trial was the violation of a state statute and there was no evidence of any fraudulent scheme or activity on the part of the Petitioner.

It is clear from the evidence and the findings of the jury which acquitted Norman Corley and convicted Clarence Mc Neely that the jury convicted Clarence McNeely pursuant to the Court's instruction regarding his action in depriving the citizens of Hardin County of the faithful performance of his official duties. (R. 605) Since no testimony connected Clarence McNeely with any knowledge that the ballots would be marked by anyone other than the persons to whom they were addressed, a conviction cannot be had in this case. Under the evidence adduced by the Government as to Clarence McNeely, it only shows that a violation of Art. 5.05.1(c) (i), V. A. T. S., Election Code of Texas that provides:

> "If the ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any address other than one of the foregoing, it shall be void and shall not be counted."

Pursuant to Art. 15.36a of the Election Code, a violation of any of its provisions is a misdemeanor.

Prior to the 1959 amendments to the Election Code, the Texas Courts construed the absentee voting requirements to be directory and not mandatory. Thus, if the elector properly cast his vote, it would not be invalidated simply because the election official failed to perform some duty placed on him. ***Stratton v. Hall,*** 90 S. W. 2d 865 (Tex. Civ. App. 1936), ***Davis v. Walcott,*** 96 S. W. 2d 817 (Tex. Civ. App. 1936), ***Sartwelle***

v. Dunn, 120 S. W. 2d 130 (Tex. Civ. App. 1938). After the 1959 amendments were passed, the law contained the provisions that the ballots would not be counted if they were not mailed out or if the application was not mailed in or if the ballot itself was not mailed in. Thereafter, the courts have considered these provisions to be mandatory. ***Atkins v. Thomas***, 407 S. W. 2d 234 (Tex. Civ. App. 1966, no writ), ***Farrell v. Jordan***, 338 S. W. 2d 269 (Tex. Civ. App. 1960 , no writ). However, in these cases, the fault was on the part of the voters. They were either not residents of the county or had failed to comply with the law insofar as applying for or casting their ballots was concerned. In the case of ***Mahaffey v. Gill***, 459 S. W. 2d 919 (Tex. Civ. App. 1970, no writ), a number of residents of a nursing home voted by absentee ballot. They had properly requested the absentee ballot and it had been mailed to them. This was at a time when the signature of the return envelope was required to be acknowledged. The County Clerk of Franklin County took the acknowledgments but he did not have his seal with him. He came to the nursing home and took the acknowledgments of those who wanted to vote. He then took the ballots to his office and put his seal on the acknowledgment as an ex officio notary public. He then placed the ballots in the mail and returned them to this office by this method. The contestant claimed that the ballots came into the Clerk's possession when he took them from the voters at the nursing home and took them to his office. The court held that this would not invalidate the ballots. Therefore, it is subject to some doubt that the ballots, if properly voted by those persons to whom they were addressed and returned properly to the County Clerk would have been void and not merely voidable.

The ***Mahaffy v. Gill, supra*** case is also helpful in deciphering the absence of any statutory requirement that the County Clerk mail the ballots discussed under the first issue. §5.05(4) provides that the carrier envelope shall be mailed, postage prepaid to the County Clerk. The Court held (p. 922):

> "Sec. 5.05, Subd. 4 . . . nowhere directs that the voter must personally place the carrier envelope in the mail. Neither does the statute purport to invalidate a ballot that the voter did not personally deposit in the mail. Merely because the county clerk or some other person mailed those ballots for these aged and infirm voters we think would not in itself invalidate the voters of said voters."

By the same reasoning, nowhere does the statute that declares the ballots void if not mailed to the voter require the County Clerk to mail the absentee ballots. If a supporter of a candidate obtained these ballots from McNeely and drove to Silsbee and there mailed them, who could say the law was violated? ***Mahaffey v. Gill*** suggests that this would be proper. If this is permissible, how can such a vague and ambiguous statute form the basis for a conviction here?

A recent case involving a public official is ***United States v. Mandel***, 591 F. 2d 1347 (4th Cir. 1979). This case involved the Governor of Maryland and involved the use of mails in schemes of bribery. However, in the ***Mandel*** case, the evidence showed gross misfeasance in office, influence peddling and outright illegal and dishonest conduct. It is a far cry from the facts provided against the Petitioner herein.

The Government alleged in Count 1, paragraph 3 of the indictment that the Petitioner wilfully failed and refused to discharge ***his*** duty as imposed by the Texas Election Code.

However, it is well settled that not every case of breach of public trust in connection with which some mailing has occurred falls within the confines of the mail fraud statute. The case of ***United States v. Rabbit***, 583 F.2d 1014 (8th Cir. 1978) is illustrative of this point. In ***Rabbit***, the defendant was the Speaker of the Missouri House of Representatives. He was

convicted on ten counts under the mail fraud statute. The indictment charged, in essence, that Rabbit defrauded the citizens of Missouri by accepting a ten percent commission on State contracts awarded to an architectural firm and concealing or failing to disclose his interest in those contracts. The evidence showed that under Missouri law *Rabbit* was under *no* affirmative duty to disclose his interest. In setting aside the mail fraud convictions the court concluded that to affirm the convictions on the mail fraud counts would mean expansion of the statute beyond its application and purpose.

2. Whether a person can be convicted pursuant to 18 U.S.C. §1341 when the integral part of the conviction is based on the violation of a state statute which is unconstitutional.

The Fifth Circuit stated in its amended opinion dated November 3, 1981, that "McNeely's culpability is premised on his involvement with hand delivering the ballots, and not on the forgery." (See appendix for full body of opinion) Therefore, since the conviction was upheld based upon the Petitioner's violation of a state statute, then of course the conviction would be invalid if the statute itself is unconstitutional. It is submitted that Art. 5.05, subdivision 1(c) (i), Texas Election Code, is unconstitutional because it places unjustified restrictions and procedures on voting absentee by mail. Applicable sections of Art. 5.05, Texas Election Code, are included in the appendix. Basically, Art. 5.05, as it relates to voting absentee by mail provides as follows:

1. Voters 65 years old or older, those who expect to be absent from the County of election and those who, because of sickness or physical disability or because of religious beliefs, cannot appear at the polls on election day, may vote absentee by mail.

2. A qualified voter who wishes to vote absentee by mail

must adhere to the following procedures:

(a) Submit an application to vote absentee by mail to the County Clerk no later than the fourth day preceding election day.

(b) After receipt of the ballot by mail, he must mail the marked ballot in a specially marked envelope to the County Clerk.

(c) Insure that the ballot is received by the County Clerk no later than 1:00 P. M. on election day.

3. If the ballot is furnished to the voter by any method other than by mailing . . . it shall be void and shall not be counted. (It is this part of the statute that the petitioner violated.)

There is no doubt that this section of the Texas Election Code is mandatory, and that strict compliance is absolutely necessary. It is also clear that the U.S. Mails must be employed to accomplish the result. Since the State of Texas has promulgated a mandatory scheme which employs the use of the U.S. Mails in order to vote absentee by mail, the restrictions and procedures must pass constitutional muster. Court decisions have made it clear that any condition, limitation, or restriction on the franchise, of any character, must meet stringent tests of justification, *Little Thunder v. State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975); must be subjected to strict scrutiny by the judiciary, *Tron v. Condell*, 427 F. Supp. 1175, (S. D. N. Y. 1976); must be nondiscriminatory, *Mc Donald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); and finally, must be necessary to promote a compelling state interest, *Keppel v. Donovan*, 326 F. Supp. 15 (D. Minn., 1970).

There is no question that the states have broad powers to

determine conditions under which the right of suffrage may be exercised, but the right to vote is constitutionally protected and conditions imposed by states upon that right must not contravene any constitutional provision or congressional restrictions and further, state election laws and administration of these laws are subject to federal constitutional standards established in the Fourteenth and Fifteenth Amendments. ***Herman v. Forssenius***, 380 U.S. 528 (1965); ***U.S. v. Manning***, 215 F. Supp. 272, (W. D. La. 1963). In the case of ***McCarty v. Kirpatrick***, 420 F. Supp. 366 (W. D. Mo. 1976), where an independent candidate brought an action challenging the constitutionality of certain statutes which made it difficult for independent candidates to be placed on the ballot, the court, in holding the statute unconstitutional, held that although the state has broad power to regulate elections, that power is subject to limitations imposed by the First, Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments to the United States Constitution. It has long since been established that statutes burdening the right to vote must meet close constitutional scrutiny and must be necessary to promote a compelling state interest. ***Reese v. Dallas County, et al***, 519 F. Supp. 1374, (5th Cir. 1974); ***Keppel v. Donovan***, 326 F. Supp. 15, (affirmed 405 U.S. 1034, 1970).

In view of the above, it is submitted that Art. 5.05, et seq, of the Texas Election Code, which voids a ballot if the procedures promogated by statute are not adhered to, are unconstitutional because of the following reasons:

1. It unnecessarily places brudens on a person's right to vote absentee.

2. There is no rational basis upon which the statute can be justified.

3. There is no compelling state interest involved which can justify its existence.

If one is to utilize the absentee voting by mail statute, he must decide to vote absentee by mail soon enough before election so that his application for a ballot reaches the Clerk *by mail* at least four days before election and the Clerk must then mail a ballot so that it reaches the voter and is voted and returned *by mail* and reaches the clerk no later than 1:00 o'clock P. M. on the date of the election. Several interesting questions are raised in adhering to his mandatory mailing scheme:

1. If the ballot is mailed out by the Clerk four days before the date of the election, but it is not received until 3:00 o'clock P. M. on the date of the election, or, it is not received by mail until one or two days after the election, the ballot is void and the voter is disenfranchised.

2. If the voter receives the ballot from the Clerk the day before the election and it takes the Postal Service longer than one day to deliver the voted ballot, the voter is disenfranchised.

3. If the voter decides that he does not have adequate time to mail the ballot in order for it to reach the County Clerk before the 1:00 O'clock election date deadline, or, he decides that the mails are not a dependable medium to employ to ensure that his ballot properly reaches the County Clerk, he cannot personally deliver his ballot to the County Clerk.

4. If the voter's ballot is mailed to him, but is lost or destroyed within four days before the election (which makes it impossible for him to personally vote absentee) he cannot go to the County Clerk and ask for another absentee ballot, since the ballot must be mailed to him.

A review of the many court decisions regarding restrictions on the right to vote points out that in almost every case, the State Legislative body seeks to defend the restrictions on two major grounds:

1. The preservation of the purity of election and the orderly administration of elections, and

2. The promotion of an enlightened electorate.

In the case of *Affeldt v. Whitsomb*, 319 F. Supp. 69, (N. D. Ind. 1970) these same two contentions were made by the State of Indiana in a futile attempt to justify its 6 months residence requirement. The Court rejected the State's position and held that the residence requirement infringed upon a person's fundamental right to vote and constituted a violation of the equal protection clause of the Fourteenth Amendment.

Since the Petitioner did not participate in, nor did he have any knowledge of, any forging of ballots which made up the fraudulent scheme, then if he had not hand delivered the ballots instead of mailing them, he would not have been convicted.

3. Whether a person can be convicted pursuant to 18 U. S. C. §1341 when evidence is admitted at trial which has already been ruled by the state court to be illegally seized and hence not admissible in a state forum.

The Petitioner, filed a motion to suppress the carrier envelope, ballots, and absentee voting paraphernalia seized by the Democratic County Chairman of Hardin County, Texas, on June 3, 1978. The record at the suppression hearing showed that the ballots and election paraphernalia were not returned to the County Clerk, as required by law, but was held for some 30 days by the County Democratic Chairman, during which time it was delivered to the County Attorney for inspection

and finally some 30 days after the election a proper motion to impound the ballots was filed.

Art. 38.23 Texas Code of Criminal Procedures provides as follows:

> "No evidence obtained by an officer or other person in violation of any provision of the constitution or laws of the State of Texas, or of the constitution of the United States of America shall be admitted in evidence against the accused on the trial of any criminal case."

This has long been the law of the State of Texas. In the instant case the election officials and principally the Chairman of the Democratic Executive Committee in Hardin County, Texas, did not comply with this law. In particular, Art. 9.02, Texas Election Code provides a procedure whereby election material and ballots may be impounded if voting irregularities are noted. (The full text of Art. 9.02 is attached in the appendix).

By not adhering to this particular section of the Election Code, then the evidence that was admitted at trial was in violation of the law. In ***Carroll v. State***, 61 S. W. 2d 1005 (1933), a case very similar to the instant case, the Texas Court of Criminal Appeals overturned a conviction because the evidence at trial namely, election ballots, was obtained illegally. In ***Carroll***, the defendant was convicted of a felong offense now contained in Art. 15.32 of the Texas Election Code which forbids any judge or clerk of an election ". . . to willfully make any false canvass of the vote at the election or a false statement of the result of the canvass of the ballots casts." The defendant objected to the introduction of the ballots at the trial for the reason that they were illegally obtained. The evidence showed that the ballot box was handled by a number of unauthorized persons and kept from time to time in several places. The law relating to the custody of the ballots had not been observed.

The Texas Court of Criminal Appeals reversed the conviction and held that the evidence was illegally obtained and should not have been used. The Court pointed out that the voted ballots and the election returns must be treated strictly in accordance with the statute. If the statute is not complied with, then the ballots obtained are inadmissible. In the instant case, if the election officials felt that it was not wise to return the paraphernalia to the County Clerk, whom they suspected, then they had their remedy under Art. 9.02 of the Texas Election Code to file a motion to have the election paraphernalia in question impounded. They had a full 24 hours after the close of the polls to do this. They chose not to comply with the law but, as in the *Carroll* case, kept the ballots in unauthorized places for approximately 30 days before a motion to impound was filed.

The records illegally seized in this case were public records. They were not private, corporate, business, or personal records, but records which the public had a right to have safeguarded with the County Clerk, or, had a right that a Court should enter an order impounding them. Failure of the public officials, namely, the County Attorney of Hardin County, Texas, and the County Democratic Chairman of Hardin County, a quasi public official, to obey the law and to seize the evidence and hold it in their own possession without any protection to the public or without any court order authorizing the action, is such a flagrant violation of the law that any evidence seized as a result of their unlawful actions should be held inadmissible. A state court, relying on the *Carroll* case, ruled that the ballots and election material obtained in the instant case were illegally seized and granted an instructed verdict of acquittal. (This unreported case was tried in Hardin County, Texas, on November 1, 1978, and is styled the State of Texas v. Francis Porter.)

4. Whether a person can be convicted pursuant to 18 U.S.C. §1341, based upon incriminating hearsay state-

ments of co-conspirators when no independent evidence showed that the Petitioner was a member of a conspiracy.

The Petitioner in the instant appeal filed a motion for a pretrial hearing on the admissibility of a co-defendant's statment pursuant to the fifth circuit court's holding in *U.S. v. James*, 590 F.2d 577 (5th Cir. 1979). Rather than have a hearing as prescribed by *James*, the trial court proceeded with the trial and then excluded the jury when he heard certain evidence from Dorothy Monson. (R. 84-90) At this point the government asked that the jury be excused and made a motion for a finding of conspiracy. (R. 91) The court indicated that the government had not yet produced sufficient testimony to get the government past the provisions of the *James* case. (R. 103) Outside the presence of the jury, the government then recalled Dorothy Monson to testify further. (R. 110) Dorothy Monson testified that in her telephone conversation with Clarence Mc Neely on the Friday before the Saturday that the ballots were delivered to her, the marking of the ballots was not mentioned. (R. 131) The first time she knew that she was supposed to mark the ballots was in her conversation with the defendant Norman D. Corley on Saturday morning May 27, 1978. (R. 131) Notwithstanding this evidence, the court ruled that the government had made the required *James* showing under Rule 801 (d) (2e), Fed. R. Evid.

The defendants continued to object to hearsay testimony and the Court permitted a running objection to all *James* type or hearsay testimony. (R. 142) The court permitted Dorothy Monson to testify to statements made by Houston Thompson, a Mr. Barrington and other people that were outside the hearing and presence of Clarence McNeely and were clearly hearsay as to him. The court also permitted statements allegedly made by Norman Corley outside the presence of Clarence McNeely. These discussions concerning the plan developed as follows: On Saturday morning, May 27, 1978,

Norman D. Corley delivered the 100 or so ballots to Dorothy Monson. She told him she had other plans and did not have time to deliver the ballots to all of the people. Norman D. Corley told her to mark the ballots herself and mail them back. Dorothy Monson testified that she called Houston Thompson and he gave her the same instructions. The plan to have Dorothy Monson and her associates mark the ballots rather than to deliver them to the persons to whom they were addressed developed Saturday morning and Clarence McNeely was not connected to this scheme or plan in any way. This hearsay testimony was inadmissible and its admission was prejudicial to Petitioner.

5. Whether a person can be convicted pursuant to 18 U.S.C. §1341, when the indictment only alleged a violation of a state statute and did not allege a violation of 18 U.S.C. § 1341.

In the instant appeal, Paragraph 8 of the indictment alleges that the acts of the conspiracy are:

1. That Clarence McNeely *would* deliver 100 absentee ballots to the defendant Norman Corley;

2. That the defendant Norman Corley would deliver the ballots to Dorothy Monson and

3. The delivery of the ballots would be without the knowledge or consent of the voters to whom the ballots were to be mailed. The indictment does not allege that any of these acts were actually accomplished nor does it allege how anyone was or would be defrauded if this conduct was carried out.

Paragraph 9 of the indictment alleges that in order to execute the alleged scheme, the defendant and Norman D. Corley knowingly and willfully placed or caused to be placed envelopes containing executed absentee ballots in the United States

Mail. It does not allege that the ballots were illegally marked.

The indictment in this case was insufficient to allege a violation under 18 U.S.C., §1341. The two necessary elements of a violation of 18 U.S.C., §1341 is a formation of a scheme with intent to defraud and the use of the mails in furtherance of that scheme. In *United States v. Seeger*, 303 F.2d 478 (2d Cir. 1962), the defendants were convicted of contempt of Congress for failing to answer questions asked by a subcommittee of the Committee on Un-American Activities of the House of Representatives in violation of 2 U.S.C. §192. The conviction was reversed and the indictment was dismissed because it failed to allege a violation under 2 U.S.C. §192. In doing so, the Court stated:

> "Sixth Amendment to the Constitution, that "in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" made against him. Procedurally, this means that an indictment must set forth an offense "with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged," U.S.v. Mills, 7 Pet. 138, 142, 8 L. Ed. 636 (1833). This, it has been long recognized that "every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment * * *" U. S. v. Cook, 17 Wall. 168, 174, 21 L. Ed. 538 (1872).
>
> "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged,

so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The same result was reached in *United States v. Lamont*, 236 F.2d 312 (2d Cir. 1956). The fact situation was the same as the preceding case. The court in affirming the dismissal of the indictments held:

> "The deficiencies in the indictments now before us are thus quite fundamental and go far beyond the question whether defendants have been put on adequate notice. Rather the question is whether defendants are to be put to trial on an allegation which on its face charges no offense."

In *Van Liew v. United States*, 321 F. 2d 664 (5th Cir. 1963), the defendants were convicted of conspiring to introduce into interstate commerce adulterated and misbranded foods, substantive offenses under the Federal Food, Drug and Cosmetic Act. The indictment alleged that the defendants represented the orange juice to be pure fresh orange juice when in fact it contained other ingredients. The convictions were overturned because of the insufficiency of the indictment. The court held that the indictment had to allege that there was a substitution of the ingredient of orange juice in order to be a violation of the statute. If the offense is not plainly alleged and can be reached only by a process of interpretation it is insufficient.

The indictment in this case is not sufficient when tested against the constitutional requirements of Article Six. It does not (1) state any facts necessary to show a violation of the statute. (2) It does not allege that the defendant and anyone else actually took any steps to carry out the scheme that is alleged. (3) It does not allege any facts to show that any fraudulent conduct was engaged in in the marking of the ballots or in

the returning of same to the county clerk. (4) It does not allege any facts which would enable the defendant to plead the indictment as a bar to any further prosecutions.

The theory of the Government as alleged in the indictment was that Clarence McNeely violated Art. 5.05(1) (c) (i), V. A. T. S., Election Code of Texas that provides:

> "If the ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any address other than one of the foregoing, it shall be void and shall not be counted."

and that the subsequent mailing back of the voted ballots alleges a violation of 18 U.S.C. §1341.

As held in the above cited cases, an indictment cannot be supported by mere inferences.

Therefore the indictment clearly fails to meet the constitutional requirements and the trial court erred in overruling defendant's motion to dismiss the indictment.

CONCLUSION

Petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

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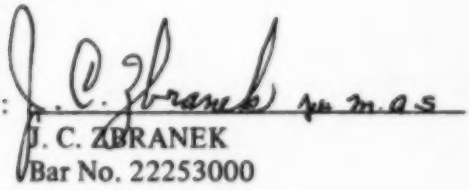
713/336-6454

By: 
J. C. ZBRANEK
Bar No. 22253000

Attorneys for Petitioner

AFFIDAVIT OF SERVICE

THE STATE OF TEXAS

COUNTY OF LIBERTY

I, J. C. Zbranek, hereby swear that I have served true and correct copies of the foregoing Petition for Certiorari on David Baugh, Assistant U. S. Attorney, P.O. Box 1510, Beaumont, Texas 77704, by mailing same, postage prepaid, this 1st day of December, 1981.

J. C. Zbranek pr. m.a.s

J. C. ZBRANEK

SWORN TO and SUBSCRIBED before me this the 1st day of December, A. D. 1981.

/s/ Barbara Ann Shipman
Notary Public in and for the
State of Texas

Art. 5.05 Absentee voting.

Subdivision 1. Who may vote absentee.

(a) Any qualified voter of this state who expects to be absent from the county of his residence on the day of the election, or who will be 65 years of age or older on the day of the election, or who because of sickness, physical disability, confinement in jail, or religious belief cannot appear at the polling place in the election precinct of his residence on the day of the election or who expects to serve as an election clerk or as a poll watcher on election day in an election precinct other than the precinct of his residence, may nevertheless cause his vote to be cast at any election held in this state by compliance with the applicable method herein provided for absentee voting. If a voter's religious belief prohibits him from voting during any part of the time during which the polls are open on the day of the election, he shall nevertheless be entitled to vote absentee even though the prohibition does not operate throughout the entire time that the polls are open. A voter who is confined in jail is entitled to vote absentee if at the time of applying for an absentee ballot he is: (1) serving a misdemeanor sentence which extends through election day; (2) being held for trial after a denial of bail; (3) being held without bail pending the appeal of a felony conviction; or (4) being held for trial or pending an appeal on a bailable charge but he expects not to have been released on bail by the date of the election.

(b) Absentee voting shall be conducted by two methods: (1) voting by personal appearance at the clerk's office, and (2) voting by mail. All voters coming within the foregoing provisions of this subdivision may vote by personal appearance at the clerk's office if they are able to make such appearance within the period for absentee voting. Where the ground for voting absentee is confinement in jail, it is not mandatory that

the voter be allowed to make a personal appearance, but the officer in charge of the jail, in his discretion, is authorized to make the necessary arrangements to permit the voter to vote by personal appearance.

(c) The following persons, and no other, may vote by mail:

(i) Qualified voters who will be 65 years of age or older on the day of the election. or who because of sickness or physical disability, or because of religious beliefs, cannot appear at the polling place on the day of the election. The application for an absentee ballot shall be made not more than sixty days before the day of the election. It must be mailed to the clerk, and the clerk shall preserve the envelope in which it is received. If the application is delivered to the clerk by any method other than by mailing it to him, the ballot shall be void and shall not be counted. The voter shall state in his application the address to which the ballot is to be mailed to him, which must be either his permanent residence address or the address at which he is temporarily living. If the ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any address other than one of the foregoing, it shall be void and shall not be counted. The marked ballot must be mailed to the clerk, and if returned in any other manner it shall be void and shall not be counted.

(iii) Qualified voters who, before the beginning of the period for absentee voting, make application for an absentee ballot on the ground of expected absence from the county of their residence on election day, and who expect to be absent from the county during the clerk's regular office hours for the entire period of absentee voting. The voter must state in his application that he expects to be absent from the county of his residence on election day and during the clerk's regular office hours for the entire period for absentee voting. The application shall be made not more than sixty days before the day of the election, and may be mailed to the clerk or delivered to him by

the voter in person, but the clerk shall not furnish a ballot to the voter by any method other than by mailing it to him. Applications made under this paragraph may be mailed either from within or without the county of the voter's residence, but in every case the ballot must be mailed to the voter at an address outside the county. The ballot shall not be counted unless the carrier envelope in which the ballot is returned to the clerk is postmarked from a point outside the county and the affidavit on the carrier envelope is certified by an officer other than an officer of the county of the voter's residence.

(iii) Qualified voters who, after the beginning of the period for absentee voting, apply for an absentee ballot on the ground of expected absence from the county and who are absent from such county at the time of applying for an absentee ballot and expect to be absent from such county during the clerk's regular office hours for the remainder of the period for absentee voting. The voter must state in his application that he is absent from the county at the time of making the application and expects to be absent on election day and during the clerk's regular office hours for the remainder of the period for absentee voting. The clerk shall not mail a ballot to any such voter unless the envelope in which the application is received is postmarked from a point outside the county, and the ballot must be mailed to the voter at an address outside the county. The ballot shall not be counted unless the envelope in which the application is received and the carrier postmarked from a point outside the county and the affidavit on the carrier envelope is certified by an officer other than an officer of the county of the voter's residence.

(vi) Qualified voters who are confined in jail under one of the circumstances listed in the first paragraph of this subdivision.

The application for an absentee ballot shall be made not more than twenty days before the day of the election. It must

be enclosed in an envelope and either mailed to the clerk or delivered to him by the jailer or one of his deputies or assistants, who shall place his signature on the envelope at the time of its delivery. The clerk shall preserve the envelope in which the application is received. If the applications delivered to the clerk by any method other than as expressly authorized herein, the ballot shall be void and shall not be counted. The clerk shall mail the ballot to the voter in care of the jail where he is confined; and if the ballot is furnished to the voter by any method other than by mailing it to him, of if it is mailed to any other address, it shall be void and shall not be counted. The marked ballot must be mailed to the clerk and if returned to any other manner it shall be void and shall not be counted.

(d) An application for an absentee ballot to be voted by mail shall state the applicant's permanent address and the address to which the absentee ballot is to be mailed to the applicant, and shall also state the address to which his voter registration certificate is to be mailed back to him.

Subdivision 1a. Elections to which applicable; officer to conduct absentee voting.

(1) General provisions. Absentee voting shall be conducted in all elections, general, special, or primary, and in each election it shall be conducted by the officer designated or appointed in accordance with the applicable provision of this subdivision. In every election, the absentee voting shall be conducted under the sames rules and in the same manner provided in this Section for absentee voting conducted by the County Clerk, and all references in other subdivisions of this Section to the County Clerk shall be deemed to mean the appropriate officer for conducting the absentee voting in that election unless the context requires a different construction.

(2) County-wide elections held at the expense of the county. In general elections for State and County officers,

in special elections call by the Governor (including both county-wide elections and elections to fill vacancies in offices elected by districts which are less than county-wide), in all other county-wide elections held at the expense of the county, and in any other elections held at absentee ballot is sent under this subdivision, with a notation that the ballot was sent to the voter through a representative, but the clerk is not required to include the names of these voters on the precinct lists of absentee voters sent to the presiding election judges.

(c) After receiving the balloting materials, the voter shall follow the procedure prescribed in Subdivision 4 of this section for voting absentee by mail, except that the marked ballot, shall be hand-delivered to the clerk by the voter's representative instead of being mailed to the clerk, The ballot must be delivered to the clerk by the deadline for receiving ballots voted by mail. It must be delivered by the clerk by the deadline for receiving ballots voted by mail. It must be delivered by the person who delivered the request to the clerk. Upon receiving the marked ballot, the clerk shall made a notation on the carrier envelope of the name and address of the person who delivered it and shall require the person to place his signature alongside his name on the envelope. The clerk shall then follow the same procedure as for a ballot received by mail. He shall return the voter's registration certificate to him by mailing it to his permanent address.

(d) A voter who gives false information in his request for an absentee ballot is guilty of a misdemeanor and upon conviction shall be punished as provided in Article 15.47, Vernon's Texas Election Code.

Subdivision 4. Voting by mail. (a) The period for absented voting by mail shall begin on the twentieth day preceding the date of the election. An application for an absentee ballot to be voted by mail must be received in the clerk's office not later than the close of business on the fourth day preceding

election day. In county-wide elections and in elections less than county-wide where the authority holding the election has provided that absentee ballots shall be counted by a special canvassing board, the marked ballot must be received in the clerk's office before one o'clock p.m. on election day, except that in an election in which the offices of president and vice president of the United States appear on the ballot; the deadline for receipt of the ballot in the clerk's office is the official time of closing of the polls on the day of the election. In all other elections which are less than county-wide, the marked ballot must be received in the clerk's office before ten o'clock a.m. on the second day preceding election day. The ballot may be marked by the voter at any time after he receives it.

(b) On the twentieth day preceding election day, or as soon thereafter as possible, the clerk shall mail an official ballot, ballot envelope, and carrier envelope, as described in Subdivision 3b of this section, to each voter who has theretofore made application for a ballot in compliance with this section. On applications which are received between the twentieth day and the fourth day preceding election day, the clerk shall forthwith mail the absentee voting supplies to the voter.

(c) The voter shall mark the ballot, sign his name on the back of the ballot stub, detach the stub from the ballot, fold the ballot, and place it in the envelope marked "Ballot Envelope" and seal the same. The voter shall then place the stub and the ballot envelope in the carrier envelope, seal the same and sign the certificate on the carrier envelope. The carrier envelope shall then be mailed, postage prepaid, to the county clerk.

Subdivision 4a. Period for absentee voting in special run-off elections held for Members of the Legislature. Notwithstanding the provisions of Subdivisions 3 and 4 of this Article, absentee voting in special run-off election held for the election

of Members of the Legislature begins on the 10th day preceding the date of the election, and the period for absentee voting by mail in such election begins not later than the 10th day preceding the date of the election. Ballots to be voted by mail may be mailed to voters and may be marked and mailed back to the clerk before the 10th day, if the ballots are available before that date. In all other respects the procedure for absentee voting in the special run-off election is the same as in other elections.

Subdivision 4b. Period for absentee voting in second primary. Notwithstanding the provisions of Subdivisions 3 and 4 of this Section, the period for absentee voting by personal appearance in each second (runoff) primary election held under the provisions of Art. 13.03 of this Code shall begin on the tenth day preceding the date of the election, and the period for absentee voting by mail in such election shall begin not later than the tenth day preceding the date of the election. Ballots to be voted by mail may be mailed to voters and may be marked and mailed back to the clerk before the tenth day, if the ballots are available before that date. In all other respects the procedure for absentee voting in the second primary shall be the same as in other elections.

Subdivision 4c. Period for absentee voting in certain other elections. Whenever any election is lawfully called for a date which does not permit the full period for absentee voting, the voting does not permit the full period for absentee voting, the voting shall begin as soon as possible after the ballots become available, provided, however, that the voting shall begin not later than the tenth day before the election.

Subdivision 4d. Voting upon return to county after applying for absentee ballot by mail. If a voter to whom an absentee ballot has been mailed returns to the county of his residence before receiving or returning the ballot and will be present in the county

Art. 9.02 Contest or prosecution by Attorney General

(1) In any special, general, or primary election in this State for any office, national, state, district, county, precinct, school. or municipal, or any election on any proposition, the Attorney General of Texas, in the case of elections involving two (2) or more counties, and the district and county attorneys, in the case of elections involving less than two (2) counties, may on their own motion, and shall when allegations of election frauds are presented to them by written affidavit of two (2) or more reputable citizens, investigate the conduct of such election and the making, canvassing, and reporting of returns. To make effective the power of such officers to investigate, the Attorney General, in elections involving two(2) or more counties, and the district and county attorneys in all other elections, are hereby authorized to impound all of the election records in the hands of any county clerk, district clerk, or any other election official by applying for and obtaining an order of a district court placing such records in the custody of the court to be examined by such officers in the presence of the district judge or a grand jury. All of such records. except the stub box, shall be subject to inspection and examination by the attorneys for the State in the cases hereby placed within their respective jurisdictions. The stub box containing identification of the individual voters shall not be opened or inspected by anyone except as otherwise provided in this Act with reference to election contests and in a grand jury room when alleged violations involve the contents of said box.

The application for impoundment and inspection of records shall be filed with the district court of a county in which the election was held, or an adjoining county, or Travis County in the case of statewide elections, and the judge of said court shall immediately issue an order impoinding such records in a vault or other secure place under such terms and conditons as will keep the records under his custody and control during the entire examination and inspection proceeding and for such

additional time as he may direct. The exparte proceeding herein provided for inspection in the presence of the judge shall be conducted in the usual manner as a court of inquiry, and the court shall issue such processes for witnesses and records relevant to the conduct of such election as may be requested by the appropriate attorney for the State, and disregard of subpoenas or other processes or refusal to testify at such hearing shall be punished by the court as in civil cases.

(2) The summary court proceeding and venue set out in subsection (1) above may be followed in the investigation and development of evidence relating to all other alleged violations of the Texas election laws. The Attorney General of Texas is hereby authorized to appear before a grand jury and prosecute any violation of the election laws of this State by any candidate, election official, or any other person, in state-wide elections, or elections involving two (2) or more counties. He may institute and maintain such prosecution alone or in conjunction with the county or district attorney of the county where such prosecution is instituted. He may call upon and direct county and district attorneys to handle the investigations and prosecutions provided for above or to assist him in such procedures. This Section is intended to be cumulative and in addition to all other prosecutions authorized by other Sections hereof and other statutes. Concurrent venue for indictments and prosecutions under this Section shall be in the county where the election law violation occurred, or an adjoining county, or in Travis County if the violation involves or relates to a state-wide election for any State or national office or any proposition submitted to the people.

(3) Any subpoena or subpoena duces tecum issued by the clerk of any district court for any hearing, election contest, or election law violation shall be effective if served anywhere within this State, provided, however, no witness shall be punished for failure to comply with such subpoena or subpoena duces tecum unless the fees provided by law are tendered him as re-

quired by statute or court rule. When called upon by the Attorney General, the Department of Public Safety and Texas Rangers shall serve any subpoenas ans assist in any investigations which may be necessary.

(4) The expense of any investigation on the part of the Attorney General of an election law violation shall be paid by the State of Texas. There is hereby appropriated for the biennium of 1951-52 the sum of Five Thousand Dollars ($5,000) out of funds not otherwise appropriated from which such expenses may be paid. Act 1951, 52nd Leg., 1097, ch. 492, art. 130.

Art. 903 Notice of contest

Any person intending to contest the election of any one holding a certificate of election for any office mentioned in this law, shall, within thirty (30) days after the return day of election, give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest. By the "return day" is meant the day on which the votes cast in said election are counted and the official result thereof declared. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 131.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

No. 80-1183

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

CLARENCE MCNEELY,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas

ORDER:

( ) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

(x) The motion appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 3, 1981 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of

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*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452 October 14, 1980.

this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____ under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Illegible
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

UNIT A

No. 80-2183
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLARENCE McNEELY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

OCTOBER 5, 1981

Before CHARLES CLARK, RUBIN AND SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Clarence McNeely was convicted by a jury on one count of mail fraud, 18 U.S.C. §1341, and sentenced to two years' imprisonment. We affirm.

The mail fraud in this case was connected with runoff election for the position of county clerk in Hardin County, Texas. McNeely was the incumbent county clerk. During the May 1978

*Former Fifth Circuit case, Section 9(1) of PUblic Law 96-452- October 14, 1980.

primary election no candidate reveived a majority of the votes, and so McNeely faced an opponent in a runoff. Prior to the runoff, McNeely attended a meeting of his supporters and various other local political figures, at which the need to stimulate absentee voting was discussed. Evidence was adduced that McNeely, contrary to what he knew to be the law, hand-delivered 109 absentee ballots to his co-defendant Corley, and that on that same afternoon and evening he spoke with a Mrs. Monson, telling her that she would rreceive the ballots from Corley and to "fix" the ballots herself. Mrs. Monson received similar instructions from other supporters of Mc Neely, including Corley, who directed her to disguise her handwriting when forging the voters' signatures and to mark them all for McNeely. Mrs. Monson forged the ballots, called Corley, who picked them up, and thereafter the ballots were received in the mail by McNeely at the county clerk's office, where they were placed in the absentee ballot box. The fraud was discovered during the tally of the absentee ballots when the persons assigned to the task noticed that a large number of the ballots contained similar markings, and that all were uniformly cast for McNeely. These suspicions of fraud were confirmed when the voting officials discovered substantial discrepancies between the voters' signatures on the absentee applications and on the ballot envelopes. On this appeal, McNeely cites four errors: (1) the indictment did not sufficiently allege a violation of the mail fraud statute; (2) the trial court admitted incriminating hearsay statements of McNeely's co-conspirators contrary to the Federal Rules of Evidence and our decision in United States v. James, 590 F.2d 575 (en banc (5th Cir.), ***cert. denied***, 442 U.S. 917 (1979); (3) the trial court admitted the absentee election materials which had been seized in violation of Texas law and lacked an established chain of custody; (4) the Texas statute requiring the use of the mail for the delivery of absentee ballots is unconstitutional and a violation of the Voting Rights

Act of 1965.1/

I.

McNeely claims the indictment was insufficient because it neither stated facts necessary to show a violation of the mail fraud statute nor alleged that McNeely took any steps to carry out the purported scheme. Rather, McNeely asserts that the government's indictment is based solely on a violation of Tex. Elec. Code Ann. art. 5.05 (1) (c) (i) (Supp. 1980). This statute provides that ballots furnished to the voter by any method other than mailing shall be void. McNeely asserts that the Texas election laws do not put any affirmative duty on the clerk to mail the absentee ballots; rather, the statutes merely stated that ballots not mailed are void. Since McNeely claims the mail fraud here is premised on his failure to render faithful duty to the public, he asserts the indictment is defective because it is based on an "inferred" duty, citing United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978). This argument is factually incorrect and without merit. McNeely cites just one subsection of the Texas election laws in support of his case. Unlike the statutes in *Rabbitt*, Texas does put an affirmative duty on the clerk to mail the absentee ballots. Tex. Elec. Code Ann. art. 5.15 (4) (g). Because the United States mails were used in transmitting the forged ballots in furtherance of McNeely's scheme, a clear allegation of mail fraud was set out in the indictment and proved at trial. *See* United States v. Martino, 648 F.2d 367, 397 (5th Cir. 1981); United States v. Green, 494 F. 2d 820, 823-24 (5th Cir.), *cert denied*, 419 U.S. 1004 (1974). As McNeely acknowledges in his brief to this court, the necessary elements of a violation of the mail fraud statute are formation of a scheme with intent to

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1/ McNeely also cites as error the failure of the trial judge to instruct a verdict in his favor at the close of the evidence on the basis that a violation of the mail fraud statute had not been proved. Our discussion under point one also disposes of this issue.

defraud and the use of the mails in furtherance of that scheme. United States v. Martino, 648 F.2d at 394. Under the record developed, the jury properly found these elements proved in this case.

II.

McNeely attacks the admissibility of various co-conspirators' statements, particularly those admitted in testimony by Mrs. Monson. This attack apparently states two grounds: (1) that under United States v. James, 590 F.2d 575 (en banc) (5th Cir), *cert. denied*, 442 U.S. 917 (1979), he was entitled to a pretrial hearing on the admissibility of these statements, and (2) that the evidence received by the court, out of the hearing of the jury, relating to the existence of the conspiracy was insufficient under *James*.

Both of these objections are without merit. In *James*, we held that the trial court should, wherever reasonably practicable, require a showing that a conspiracy existed prior to admitting co-conspirators' statements. 590 F.2d at 582. *James* says nothing to indicate that this preliminary finding must be made in a pretrial hearing, and later cases in this circuit have made explicit that such a hearing is not required. United States v. Ricks, 639 F.2d 1305, 1310 (5th Cir. 1981). The evidence was more than sufficient to establish a conspiracy. McNeely was actively involved with both Corley and Monson in the hand-delivering of the absentee ballots. That activity lies at the heart of the scheme to defraud. This substantial evidence allowed the hearsay statements to come in under Rule 801 of the Federal Rules of Evidence and *James*, 490 F.2d at 581.

III.

McNeely contends that the Texas election statutes were violated because the ballots were held 30 days by the County Democratic Chairman rather than being impounded as required

by Texas law, so that their admission in evidence was barred. McNeely cites a Texas statute forbidding the admissibility of evidence obtained in violation of any provision of Texas law. Tex. Code Crim. Proc. Ann. art. 38.23 (Supp. 1980). If such a violation were conceded it would avail McNeely nothing because the question of admissibility in the federal forum is one of federal law. United States v. Castillo, 449 F. 2d 1300, 1301 n. 2 (5th Cir. 1971); United States v. Sotomayor, 592 F.2d 1219, 1223-24 (2d Cir.) *cert. denied,* 442 U. S. 919 (1979). McNeely cites Elkins v. United States, 364 U.S. 206 (1960) which holds that evidence seized by state officers in violation of the fourth amendment is inadmissible in a federal forum. *Elkins* is inapposite. McNeely's only tenable claim is that the handling of the ballots violated Texas law. No claim is made of any violation of the fourth amendment of the United States Constitution necessary to invoke the exclusionary rule. Moreover, under federal law McNeely has no standing to seek to suppress the ballots because their seizure did not violate any of his privacy or property rights. Rankas v. Illinois, 439 U.S. 128, 134-37 (1978).

McNeely's chain of custody theory is similarly without merit. The Federal Rules of Evidence require only that identification testimony be sufficient to support a finding that the matter in question is what its proponent claims. Fed. R. Evid. 901(a). Testimony that the ballots were what they were purported to be was supplied at trial by Mrs. Monson and the vote tally clerk. This evidence was sufficient to support the jury's finding on identity regardless of the establishment of a chain of custody. Fed. R. Evid. 901 (b) (1).

IV.

McNeely's attack on the constitutionality of the Texas election statutes is beside the mark. McNeely was convicted of mail fraud, not of violating the Texas statutes. He would best leave any defense of the right to vote to others.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-2183

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLARENCE McNEELY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING
(NOVEMBER 3, 1981)

Before CLARK, Chief Judge, RUBIN and SAM D. JOHNSON, Circuit Judges.

BY THE COURT:

The opinion of the court dated October 5, 1981, is amended by inserting the following words as indicated:

Pg. 2, Line 7. After - herself. Insert - Mrs. Monson subsequently recanted her testimony that McNeely played any role in the forging of ballots. Since, as we discuss *infra*, NcNeely's culpability is premised on his involvement with hand-delivering the ballots, and not on the forgery, it is unnecesary to comment on the importance of this aspect of Monson's testimony. Mrs. Monson received [omit - similar] instructions from other . . . . (etc.).

Pg. 3, Line 16. After - Ann. art. 5.15(4) (g). Insert - McNeely knew that hand-delivered ballots were void, and that the voters using those ballots would lose their vote by disqualification if the hand-delivery were discovered. Therefore, because the United States mails were used to receive the hand-delivered ballots, in furtherance of McNeely's scheme, a clear allegation of mail fraud was set out in the indictment and proved at trial. *See United States v. Martino*, etc.

The amended opinion attached shall issue as the opinion of the court. In all other respects, the petition for rehearing is DENIED.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 80-2183
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLARENCE McNEELY,
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas

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AMENDED OPINION ON PETITION FOR REHEARING

Before CLARK, Chief Judge, RUBIN, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Clarence McNeely was convicted by a jury on one count of mail fraud, 18 U.S.C. §1341, and sentenced to two years' imprisonment. We affirm.

The mail fraud in this case was connected with a runoff election for the position of county clerk in Hardin County, Texas. McNeely was the incumbent county clerk. During the May 1978 primary election on candidate received a majority

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

of the votes, and so McNeely faced an opponent in a runoff. Prior to the runoff, McNeely attended a meeting of his supporters and various other local political figures, at which the need to stimulate absentee voting was discussed. Evidence was adduced that McNeely, contrary to what he knew to be the law, hand-delivered 109 absentee ballots to his co-defendant Corley, and that on that same afternoon and evening he spoke with a Mrs. Monson, telling her that she would receive the ballots from Corley and to "fix" the ballots herself. Mrs. Monson subsequently recanted her testimony that McNeely played any role in the forging of ballots. Since, as we discuss *infra*, McNeely's culpability is premised on his involvement with hand-delivering the ballots, and not on the forgery, it is unnecessary to comment on the importance of this aspect of Monson's testimony. Mrs. Monson received instructions from other supporters of McNeely, including Corley, who directed her to disguise her handwriting when forging the voters' signatures and to mark them all for McNeely. Mrs Monson forged the ballots, called Corley, who picked them up, and thereafter the ballots were received in the mail by McNeely at the county clerk's office, where they were placed in the absentee ballot box. The fraud was discovered during the tally of the absentee ballots when the persons assigned to the task noticed that a large number of the ballots contained similar markings, and that all were uniformly cast for McNeely. These suspicions of fraud were confirmed when the voting officials discovered substantial discrepancies between the voters' signatures on the absentee applications and on the ballot envelopes.

On this appeal, McNeely cites four errors: (1) the indictment did not sufficiently allege a violation of the mail fraud statute; (2) the trial court admitted incriminating hearsay statements of McNeely's co-conspirators contrary to the Federal Rules of Evidence and our decision in United States v. James, 590 F.2d 575 (en banc) (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); (3) the trial court admitted the absentee election materials which had been seized in violation of Texas law and lacked an

established chain of custody; (4) the Texas statute requiring the use of the mail for the delivery of absentee ballots is unconstitutional and a violation of the Voting Rights Act of 1965. 1/

I.

McNeely claims the indictment was insufficient because it neither stated facts necessary to show a violation of the mail fraud statute nor alleged that McNeely took any steps to carry out the purported scheme. Rather, McNeely asserts that the government's indictment is based solely on a violation of Tex. Elec. Code Ann. art. 5.05 (1) (c) (i) (Supp. 1980). This statute provides that ballots furnished to the voter by any method other than mailing shall be void. McNeely asserts that the Texas election laws do not put any affirmative duty on the clerk to mail the absentee ballots: rather, the statutes merely stated that ballots not mailed are void. Since McNeely claims the mail fraud here is premised on his failure to render faithful duty to the public, he asserts the indictment is defective because it is based on an "inferred" duty, citing United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978). This argument is factually incorrect and without merit. McNeely cites just one subsection of the Texas election laws in support of his case. Unlike the statutes in *Rabbitt*, Texas does put an affirmative duty on the clerk to mail the absentee ballots. Tex. Elec. Code Ann. art. 5.15(4) (g). McNeely knew that hand-delivered ballots were void, and that the voters using those ballots would lose their vote by disqualification if the hand-delivery were discovered. Therefore, because the United States mails were used to receive the hand-delivered ballots, in furtherance of McNeely's scheme, a clear allegation of mail fraud was set out

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1/ McNeely also cites as error the failure of the trial judge to instruct a verdict in his favor at the close of the evidence on the basis that a violation of the mail fraud statute had not been proved. Our discussion under point one also disposes of this issue.

in the indictment and proved at trial. *See* United States v. Martino, 648 F.2d 367, 397 (5th Cir. 1981); United States v. Green, 494 F. 2d 820, 823-24 (5th Cir.), *cert. denied*, 419 U.S. 1004 (1974). As McNeely acknowledges in his brief to this court, the necessary elements of a violation of the mail fraud statute are formation of a scheme with intent to defraud and the use of the mails in furtherance of that scheme. United States v. Martino, 648 F.2d at 394. Under the record developed, the jury properly found these elements proved in this case.

III.

McNeely attacks the admissibility of various co-conspirators' statements, particularly those admitted in testimony by Mrs. Monson. This attack apparently states two grounds: (1) that under United States v. James, 590 F. 2d 575 (en banc) (5th Cir.), *cert. denied*, 442 U.S. 917 (1979), he was entitled to a pretrial hearing on the admissibility of these statements, and (2) that the evidence received by the court, out of the hearing of the jury, relating to the existence of the conspiracy was insufficient under *James*.

Both of these objections are without merit. In *James*, we held that the trial court should, wherever reasonably practicable, require a showing that a conspiracy existed prior to admitting co-conspirators' statements. 590 F.2d at 582. *James* says nothing to indicate that this preliminary finding must be made in a pretrial hearing, and later cases in this circuit have made explicit that such a hearing is not required. United States v. Ricks, 639 F.2d 1305, 1310 (5th Cir. 1981). The evidence was more than sufficient to establish a conspiracy. McNeely was actively involved with both Corley and Monson in the hand-delivering of the absentee ballots. That activity lies at the heart of the scheme to defraud. This substantial evidence allowed the hearsay statements to come in under Rule 801 of the Federal Rules of Evidence and *James*, 490 F.2d at 581.

III.

McNeely contends that the Texas election statutes were violated because the ballots were held 30 days by the County Democratic Chairman rather than bring impounded as required by Texas law, so that their admission in evidence was barred. McNeely cites a Texas statute forbidding the admissibility of evidence obtained in violation of any provision of Texas law. Tex. Code Crim. Proc. Ann. art. 38.23 (Supp. 1980). If such a violation were conceded it would avail McNeely nothing because the question of admissibility in the federal forum is one of federal law. United States v. Castillo, 449 F.2d 1300, 1301 n. 2 (5th Cir. 1971); United States v. Sotomayor, 592 F.2d 1219, 1223-24 (2d Cir.), *cert. denied*, 442 U. S. 919 (1979). McNeely cites Elkins v. United States, 364 U.S. 206 (1960) which holds that evidence seized by state officers in violation of the fourth amendment is inadmissible in a federal forum. *Elkins* is inapposite. McNeely's only tenable claim is that the handling of the ballots violated Texas law. No claim is made of any violation of the fourth amendment of the United States Constitution necessary to invoke the exclusionary rule. Moreover, under federal law McNeely has no standing to seek to suppress the ballots because their seizure did not violate any of his privacy or property rights. Rakas v. Illinois, 439 U.S. 128, 134-37 (1978).

McNeely's chain of custody theory is similarly without merit. The Federal Rules of Evidence require only that identification testimony be sufficient to support a finding that the matter in question is what its proponent claims. Fed. R. Evid. 901(a). Testimony that the ballots were what they were purported to be was supplied at trial by Mrs. Monson and the vote tally clerk. This evidence was sufficient to support the jury's finding on identity regardless of the establishment of a chain of custody. Fed. R. Evid. 901(b) (1).

IV.

McNeely's attack on the constitutionality of the Texas election statutes is beside the mark. McNeely was convicted of mail fraud, not of violating the Texas statutes. He would best leave any defense of the right to vote to others.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *

No. 80-2183
Summary Calendar

D. C. Docket No. Cr-B-80-21

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLARENCE McNEELY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before CHARLES CLARK, Chief Judge, RUBIN and SAM D. JOHNSON, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on defendant-appellant's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered by this Court is amended; and the conviction of the said District Court appealed from is affirmed.

NOVEMBER 3, 1981

ISSUED AS MANDATE:
*Former Fifth Circuit case, Section 9(1) of Public Law 96-456-October 14, 1980.